

ENTERED
Office of Proceedings
SEP 23 2010
Part of
Public Record

227850

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-254 (SUB-NO. 10)

**PROVIDENCE AND WORCESTER RAILROAD COMPANY – ADVERSE
ABANDONMENT – TRACK OF HOUSATONIC RAILROAD COMPANY, INC.
IN FAIRFIELD AND NEW HAVEN COUNTIES, CONNECTICUT**

**MOTION OF PROVIDENCE AND WORCESTER RAILROAD COMPANY
TO STRIKE THE SEPTEMBER 15, 2010 REPLY OF HOUSATONIC
RAILROAD COMPANY, INC.**

Providence and Worcester Railroad Company ("P&W") submits the following motion to strike the letter reply, dated September 15, 2010 of Housatonic Railroad Company, Inc. ("HRRC") opposing P&W's September 10, 2010 filings of (1) a letter seeking waiver or reduction of certain filing fees (the "Fee Waiver Request"), and (2) Petition for Waiver of certain requirements of the Surface Transportation Board's ("STB") or ("Board") abandonment regulations (the "Waiver Petition"). As discussed below, HRRC's September 15, 2010 letter (the "HRRC Letter") is defective both because HRRC has no legitimate interest to challenge the Fee Waiver Request or the Waiver Petition and because its contentions are premature, irrelevant and inaccurate.¹

I. INTRODUCTION

On September 10, 2010, P&W filed both the Fee Waiver Request and the Waiver Petition pertaining to an anticipated application for adverse abandonment concerning a

¹ Although HRRC contends it did not receive those filings from P&W, P&W did serve HRRC in accordance with the Board's procedural rules by mailing a copy, on September 10, 2010, of each document to HRRC to the following addresses: 1 Railroad Street, Canaan, CT 06018 and P.O. Box 687, Old Lyme, CT 06371.

segment of rail line owned by HRRRC over which P&W has trackage rights. The HRRRC Letter appears to oppose both filings, contending that the Fee Waiver Request is not in the "public interest," that paying a \$22,600 filing fee was not an "undue hardship" for P&W and that HRRRC intends to "vigorously defend any adverse application that might be filed." Each of these assertions is incorrect and in any event irrelevant to a determination of P&W's requests.

The HRRRC Letter also contends that the Board cannot properly use such a procedure to compel the transfer of a rail line from a Class III carrier to a Class II carrier, that the facts would not justify the grant of any such remedy, that HRRRC is attempting to put the subject line back in service, that P&W is allegedly in material breach of the terms of the underlying trackage rights agreement, and that P&W has alternate remedies so that there is no need to use the adverse abandonment procedure. These contentions are similarly incorrect but, moreover, have no relevance or bearing on either the Fee Waiver Request or the Waiver Petition. While HRRRC may elect to raise these allegations in its defense to the adverse abandonment application when that is filed, they should be stricken at this time.

II. HRRRC HAS NOT PROVIDED A LEGITIMATE BASIS TO CHALLENGE THE FEE WAIVER REQUEST

Although an aggrieved party can properly challenge a petition that would adversely affect its rights, HRRRC has neither alleged nor demonstrated how it would be adversely affected by the grant of the Fee Waiver Request. HRRRC does devote one sentence to alleging that P&W failed to show that the public interest justifies a reduction in the filing fees, though it offers no support for that naked assertion. Its real argument, however, is that the cost to P&W for pursuing this remedy should be as high as possible.

HRRC claims initially that P&W will need to invest over \$2 million in order to operate over this track; ergo, if P&W has the funds to do that, a \$22,600 filing fee should be of little consequence. Moreover, since HRRC will “vigorously defend” against the application, the Board’s processing costs will be high.

The Board’s filing fees are user fees intended to defray the government’s cost of processing applications, not to prevent access to the Board’s administrative processes. The fact that P&W will need to invest significant funds to acquire and rehabilitate track HRRC has put out of service supports keeping the administrative cost to P&W as low as possible. In pursuing this relief, P&W is acting much like a local community or public entity (for which all such filing fees are routinely waived) in order to preserve essential rail service for a significant customer.

P&W’s Fee Waiver Request explained that the adverse abandonment application it intends to file is essential in order to continue to provide service to an important rail-served customer and that the alternative method for ensuring rail service under the Feeder Railroad Development Procedures in 49 U.S.C. §10907 were not available simply because P&W is a Class II, not Class III, railroad. Yet, the evidentiary basis for going forward in an adverse abandonment is similar to a section 10907 proceeding, as both require a showing that continued rail service is important, that the incumbent is not providing that service, and that the applicant is willing and able both to provide the service and purchase the line in question. Whatever value the Board might ultimately establish as the purchase price of the track that is in question, it would seem self-evident that a \$22,600 filing fee is a significant burden on many parties, let alone a Class II carrier whose sole motivation is to preserve rail service for a customer.

P&W recognizes that interested persons have a right to comment in proceedings before the Board to the extent the matters raised might affect their interests. Here, however, HRRC has challenged only the Fee Waiver Request. While HRRC would have an interest in P&W's adverse abandonment application and the Waiver Petition, it has failed to articulate how it is adversely affected by P&W's request to reduce filing fees. As increasing the litigation costs of an adversary is not an appropriate basis to intervene in opposition to such a request, the HRRC Letter should be stricken.

III. THE HRRC LETTER IS PREMATURE AND IRRELEVANT TO THE FEE WAIVER REQUEST

HRRC contends, without support, that it is inappropriate for P&W to seek to use the adverse abandonment procedure to "compel the transfer of an active rail line" from a Class III carrier.² Since P&W has not yet filed any such application, HRRC's contention is at best premature and should be stricken on that basis alone. HRRC's argument is legally and factually defective for a number of other reasons that justify P&W's request to strike.

First, the track that will be the subject of P&W's adverse abandonment application is in no way an "active rail line." Indeed, P&W is compelled to initiate action before the Board in this matter solely due to HRRC's refusal to maintain the track, which has now resulted in having it placed out of service, thus effectively preventing P&W from exercising its trackage rights over the line and providing service to its shipper.

² The HRRC Letter does not literally challenge the Waiver Petition or otherwise ask that it be denied. Instead, HRRC asks that it be given 20 days to reply to the Waiver Petition from the date the Board either grants or denies the Fee Waiver Request. As HRRC has not even attempted to show good cause to further delay the handling of this matter or otherwise explain why it did not or cannot file any reply within the 20 days provided as a matter of course under 49 C.F.R. § 1104.13, P&W opposes that request.

Second, and unlike the situation with respect to Feeder Railroad Development Procedures under section 10907, there is no statutory bar to a Class II railroad's resort to the adverse abandonment procedure under circumstances where, as here, the incumbent has essentially imposed an unlawful, *de facto* abandonment that precludes the provision of rail service to shippers. Indeed, even Class I railroads have used these procedures to compel the abandonment and sale of track that the incumbent was no longer actively serving. See, e.g., *CSX Corporation and DSX Transportation, Inc. - - Adverse Abandonment application - - Canadian National Railway Company and Grand Trunk Western Railroad Inc.* (Docket No. AB-31 (Sub-No. 38); decision served Feb. 1, 2002) (finding that the incumbent was not moving traffic over the line and that a grant of the application would result in improved rail service to the public).

HRRC's contention that the use of such a procedure is inappropriate where the applicant has overhead trackage rights only is simply incorrect. An applicant in such case need not even be an active railroad, but can be any party that seeks to terminate a rail carrier's right to operate over a line of track. See, e.g., *The City of Chicago, Ill. - - Adverse Abandonment - - Chicago Terminal Railroad in Chicago, Ill.* (Docket No. AB-1036; decision served June 16, 2010); *Cerro Gordo County, Iowa - - Adverse Abandonment - - Backtrack, Inc.* (Docket No. AB-1063; decision served April 29, 2010). In any event, as P&W does have trackage rights over the line, it has a continuing obligation to provide rail service until such time as the Board authorizes its termination. *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 145 (1946); *Southern Pacific Transportation Company - - Discontinuance of Service - - In San Francisco County, CA* (I.C.C. Docket F.D. No. 31486; decision served September 7, 1989).

Similarly, HRRC prematurely offers several other erroneous contentions to support its position that there is no justification for the grant of an adverse abandonment application. Aside from the fact that HRRC will have the opportunity to make its case in opposition to the application when it is filed, its assertions are incorrect. For example, P&W's ability to provide service to the shipper over an alternative routing is about to be stymied by action of the Connecticut Department of Transportation, which is rehabilitating that line for the benefit of Metro North Railroad's commuter rail operations. Accordingly, an adverse abandonment proceeding is essential. Moreover, whether or not there has been local traffic on a portion of the line, HRRC has refused to maintain the track and has instead let it degrade to the extent that HRRC itself was forced to place the line out of service. Notwithstanding HRRC's assertion that it does not intend to abandon the track, it has functionally already done so.

In addition, P&W has been compelled to use the alternative routing discussed above to service this shipper only because of the long-standing maintenance shortcomings on the HRRC track. However, the HRRC routing is much more desirable because it is approximately one-third shorter in distance and substantially less expensive to utilize.

While HRRC now professes an intention to put the line back in service (at some indefinite time, without having done anything to further that goal), it previously took the position that it had no obligation to do so and that P&W should expend the monies required to rehabilitate the line if it wished to operate over it.³ P&W has routinely spent

³ Although not relevant here, P&W categorically denies that it has breached the terms of the Trackage Rights Agreement, owes any money to HRRC or has in any way hampered HRRC's efforts to "perform necessary improvements to the line."

its own money to rehabilitate and maintain this line, but is unwilling to continue to subsidize HRRC and expend sums on property that it does not own.

Again, while P&W understands that HRRC may well oppose the adverse abandonment application, there is an appropriate time and procedure for attempting to make that case. This is not that time and HRRC has offered no reason - - other than an inappropriate desire to bleed P&W's finances - - to oppose the Fee Waiver Request or the Waiver Petition.

IV. CONCLUSION

As shown more fully above, the HRRC Letter seeking denial of P&W's Fee Waiver Request and Waiver Petition is fundamentally defective, and offers no cogent, substantive, factual or relevant basis for interposing an objection to either pleading. Read in its most favorable light, that document raises contentions that might be relevant in opposition to an adverse abandonment application. But, since nothing contained therein is relevant to the pleadings that P&W has filed to date, the HRRC Letter should be stricken.

Respectfully submitted,



By

Edward D. Greenberg
David K. Monroe
GKG Law, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
Telephone: 202-342-5277
Facsimile: 202-342-2311

Marie Angelini, Esq.
Providence and Worcester
Railroad Company
75 Hammond Street
Worcester, MA 01610
Phone: 508-795-4000

Attorneys for
Providence and Worcester Railroad
Company

Dated: September23, 2010

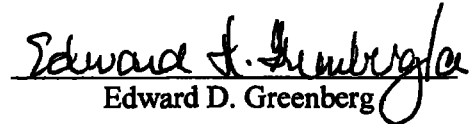
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Strike of the Providence and Worcester Railroad Company was served by electronic and first-class mail this date on the following parties:

Housatonic Railroad Company, Inc.
8 Davis Road West
P.O. Box 687
Old Lyme, CT 06371

Housatonic Railroad Company, Inc.
One Railroad Street
P.O. Box 1146
Canaan, CT 06018

Dated this 25th day of September, 2010.


Edward D. Greenberg